In the High Court of Judicature at Madras

Dated: 09-01-2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.217 OF 1997
and
C.M.P.Nos.2561 and 3069 of 1997

S.Govindasamy ..Appellant/Defendant

v

Gajalakshmi ..Respondent/Plaintiff

Second appeal filed under section 100 CPC against the judgment and decree dated 08.12.1995 made in A.S.No.14 of 1995 on the file of the Subordinate Judge, Poonamallee, reversing the Judgment and decree dated 18.7.1994 passed in O.S.No.703 of 1985 on the file of the District Munsif's, Poonamallee.

For Appellant : Mr.S.Y.Raghuraman

For Respondent : Mr.S.Sadasharam.

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.14 of 1995 on the file of the Court of Subordinate Judge, Poonamallee dated 8.12.1995. The plaintiff in O.S.No.703 of 1985 on the file of the Court of District Munsif, Poonamallee is the appellant herein. The plaintiff has filed the suit for declaration and injunction in respect of the suit property.

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2. The short facts of the averments in the plaint relevant for the purpose of deciding this appeal sans irrelevant particulars are as follows:
The suit property belonged to the plaintiff absolutely and he is in possession and enjoyment of the same by constructing a hut in the suit property. The suit property was assigned in favour of the plaintiff by the Government under the proceedings of the

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District Collector in R.Dis.No.81289/80/N.2 dated 3.11.1980. The plaintiff has filed assignment order along with the plaint. He is also paying house tax for the residential hut and also paying assessment tax to the suit site. The defendant is owning the adjacent plot No.5 to the east of the suit property,who is having no interest in the suit property is making attempt to grab at the suit property of the plaintiff by illegal means. The defendant is also trying to cause cloud upon the plaintiff's title to the suit property. The suit property is different from the defendant's property. Under the guise of the decree obtained by the defendant against his brother Ramu and others in O.S.No.169 /1977 on the file of the Court of District Munsif, Poonamallee is trying to dispossess the plaintiff from the suit property. The plaintiff is not a party to the said suit. The suit property in O.S.No. 169/1977 is totally different from the property in the suit. Hence, the defendant cannot claim any right or title to the suit property. Hence the suit.

3. The defendant in his written statement would contend that the suit is not maintainable under law and facts. The suit is a vexatious and frivolous one. The averment in the plaint that the plaintiff is the owner of the suit property and he is in possession and enjoyment of the suit property are false. The important material facts have been omitted to be stated by the plaintiff in the plaint. The plaintiff has filed O.S.No.999 of 1979 on the file of this Court for permanent injunction and the suit property in the said suit is a thatched hut and premises measuring 0.01 cents in village Natham S.No.207 at Ramapuram, Ambattur, Saidapet Taluk, bounded on the north by Mudaliar's house. South by road east by defendant's site and west by Sulaiman's site. The suit property in the present suit is the same with the difference of small area and lineal measurements. The said suit in O.S.No.999 of 1979 is dismissed. The fact in the above said suit and the present suit are one and the same. The issue arises for consideration is also one and the same. Hence the suit is barred by the principle of res-judicata. The defendant is the absolute owner of the suit property and the Government has assigned the said property in favour of the defendant and the defendant is in possession and enjoyment of the same as early as in 1956. The property assigned in favour of the defendant includes suit property and the suit property is in the occupation of the defendant. This defendant was in possession and enjoyment of the suit property for more than three decades. This defendant constructed a thatched superstructure in a portion of the entire property belonging to him and permitted his brother one Ramu @ Raman to reside there, since he was unemployed. The said Ramu @ Raman along with one Anandan committed acts of waste on 26.11.1977 to the tune of Rs.1000/- by cutting and carrying away the trees of 21 years old on the western boundary of this

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defendant, which is also western boundary of the suit property. Since the act of Ramu @ Raman is detrimental to the interests of this defendant,he issued a lawyer's notice dated 29.11.1977 calling upon him to vacate the property. Since the said Ramu failed to vacate, this defendant filed a suit in O.S.No.169/1977 on the file of this Court. The said Ramu died pending suit. His wife Lakshmiammal was impleaded as a party in the said suit as a legal heir to the said Ramu @ Raman. This defendant also filed another suit against the said Ramu @ Raman and Anandan, for damages of Rs.800/- in O.S.No.365 of 1977 on the file of this Court. Both the suits are decreed in favour of this defendant. Subsequently, the plaintiff has filed a suit against the defendant in O.S.No.999 of 1979 on the file of this Court for a permanent injunction and the suit property in the said suit is the one and the same in the present suit. O.S.No.999 of 1979 was also decided in favour of this defendant. The matters in issues in the suits O.S.Nos.169 of 1977, 365 of 1977 and 999 of 1979 are the same as in this suit and hence this suit is barred by the principles of res-judicata. The plaintiff has filed a suit in O.S.No.999 of 1979 alleging that she had purchased the suit property from Kasthuriamml. In the meantime, the plaintiff seems to have got the alleged assignment order after obtaining a sale deed from Kasthuriammal while, O.S.No.999 of 1979 is pending. Therefore, the said assignment order dated 3.11.1980 will not confer any title to the defendant. The defendant is the absolute owner of the suit property. The defendant has a valid legal right by way of executing decree in O.S.No.169 of 1977. There is no cause of action for the suit. The court fee paid in the plaint is not correct. Hence, the suit is liable to be dismissed with costs.

4. On the above pleadings, the trial Court had framed five issues . On the side of the plaintiff Exs A1 to A15 were marked and the plaintiff has examined herself as P.W.1. The defendant has examined himself as D.W.1 and exhibited Exs B1 to B3. After going through the documentary and oral evidence let in by both parties, the learned trial Judge has come to a conclusion that the plaintiff is not entitled to any relief in the suit and accordingly dismissed the suit without costs. Aggrieved by the findings of the learned trial Judge, the plaintiff has preferred appeal in A.S.No.14 of 1995 before the Sub Judge, Poonamallee, who after analysing the grounds of appeal has allowed the appeal, setting aside the decree and Judgment in O.S.No.703 of 1985 thereby decreeing the suit as prayed for without costs. Aggrieved by the findings of the first appellate Court, Poonamallee, the defendant in O.S.No.703 of 1985 has preferred this appeal.

5. The substantial questions of law involved in this appeal are

i) Whether the finding of the first appellate

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Court that the suit of the plaintiff was not barred by res judicata is sustainable in law?
ii) Whether the suit is barred under the provision of Order 2 Rule 2 of C.P.C.?

6. The Points:

The property schedule to the plaint is Plot No.4, Kumaran Street, Ambattur, Ambathur Sub Registration District, Saidapet Taluk, Chengleput District,measuring 28 links east-west on both sides, 52 links , north south on the west and 57 links north south on the east and measuring about ,0.02.cents. The boundaries given to the suit plot No.4 is bounded on the east by plot No.5 belonging to the defendant; west by plot No.3 belonging to Michannal Sulaiman; south by street and north by land belonging to Arumugha Nadar. Admittedly, the plaintiff filed O.S.No.999 of 1979 on the file of the Court of District Munsif, Poonamallee. A perusal of the Judgment in Ex A13(Paragraph 9(first one) at page 8) will go to show that the plaintiff has claimed right under Plot No. 4 through ExA12 assignment order of the Government. There is a clear finding in Ex A13 suit that the plaintiff is the owner of the plot No.4 under Ex A12 assignment order dated 3.11.1980.Ex A13 suit is not for any declaration of the suit property but the relief asked for in the suit is only for mere injunction. But both the plaintiff and the defendant are one and the same in this suit and also in O.S.No.703 of 1985. A perusal of Ex B3, the suit register extract in O.S.No.999 of 1979 will go to show that the plaintiff has filed the suit for injunction in respect of the same plaint schedule property in O.S.No.703 of 1985(present suit against which this appeal is pending). In Ex B3, the schedule of property in O.S.No.999 of 1979 is mentioned as thatched hut and premises measuring about 0.01 cents in the Village of Natham, Survey No.207 at Ramapuram, Ambattur Village, Saidapet Taluk, Chengleput District, bounded on the north by Sundaramoorthi Mudaliar's house,(tenanted by Arumuga Nadar)South by(not clear) east by defendant's site and west by Sulaiman's site. It is seen from Ex A7 that on the west of the plaint schedule property, Plot No.4 lies the land of Sulaiman's site; South lies the street and east lies the land belongs to Govindan. There is no dispute to the fact that Ex A13 suit was also filed in respect of the plaint schedule property in O.S.No.703 of 1985. The only difference is in Ex A13 paragraph 9(first one) at Page 8, the plaintiff has categorically stated that he got the plot under Ex A12 assignment order in respect of plot No.4, the suit property. But on the basis of Ex A12, assignment order, the plaintiff has not claimed any declaration of title in O.S.No.999 of 1979 . On the other hand, under Ex A7 order of assignment in respect of plot No.4(which is Ex A12 in Ex A13 suit in O.S.No.703 of 1985) the plaintiff has claimed declaration of title and injunction. Section 11 of CPC runs as follows:

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"Res Judicata: No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim,litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I: The expression"former suit"shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

(Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for

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the execution of that decree.

Explanation VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.)"

7. The learned counsel appearing for the appellant would contend that the suit in O.S.No.703 of 1985 is barred under the principles res judicata since in respect of the same suit property in O.S.No.703 of 1985 between the same plaintiff and the defendant, the matter has been adjudicated in the earlier suit in O.S.No.999 of 1979 under Ex A13, and the learned District Munsif, Poonamallee has dismissed the claim of the plaintiff in O.S.No. 999 of 1979. Hence, the plaint in O.S.No.703 of 1985 is barred by res judicata and the claim of the plaintiff in O.S.No.703 of 1985 is hit by Section 11 CPC.

8. Per contra, the learned counsel appearing for the respondent would contend that even though the parties in O.S.No.703 of 1985 and the plaint schedule property in O.S.No.703 of 1985 are one and the same in Ex A13 suit(O.S.No.999 of 1979), the relief asked for in O.S.No.999 of 1979 is only bare injunction whereas in O.S.No.703 of 1985 , the relief asked for the declaration and injunction in respect of the suit property. This contention of the learned counsel appearing for the respondent cannot be upheld in view of the provisions contemplated under Order II Rule 2 (3) CPC which runs as follows:

"Suit to include the whole claim:(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action;but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court;

2) Relinquishment of part of claim: Where a plaintiff omits to sue in respect of , or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished;

3) Omission to sue for one of several reliefs: A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits,except with the leave of the Court, to sue for all such reliefs, he shall not

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afterwards sue for any relief so omitted."

In Ex A13 suit also the plaintiff has produced the order of assignment in his favour by the Government as Ex A12. In O.S.No.703 of 1985, the same assignment order dated 3.11.1980 has been produced by the plaintiff and marked as Ex A7. But the plaintiff, who has omitted to, ask for the relief of declaration in Ex A13 suit in respect of the same suit property, has now come forward with O.S.No.703 of 1985 with a relief of declaration and injunction, which is clearly barred under Order 2 Rule 2(3) CPC.

9. The learned counsel appearing for the respondent would contend that only after the filing of Ex A13 suit, he got an order of assignment and hence he was only able to produce Ex A12 assignment order before the said trial Court, but could not ask for the relief of declaration. But nothing prevented the plaintiff from filing a petition to amend the plaint, thereby incorporating the relief of declaration also in Ex A13 suit in respect of the same suit property. But without adopting to the said course, the plaintiff has filed O.S.No.703 of 1985 against the same defendant ie., after six years from the date of filing of O.S.No.999 of 1979 which cannot be entertained at all for any reason much less, the reason adverted by the learned counsel appearing for the respondent. So this Court is of the view that the suit is barred under Order 2 Rule 2(3) CPC.

10. The decision relied on by the learned counsel for the appellant in Gram Panchayat of Village Naulakha-vs-Ujagar Singh and others(AIR 2000 Supreme Court 3272) on the point of res judicata wherein it has been decided by the Apex Court as follows:

> "One other important reason which frequently arises under Section 11 CPC, the earlier suit by the respondent against the Panchayat was only a suit for injunction and not one on title. No question of title was gone into nor decided. The said decision cannot, therefore, be binding on the question of title. See in this connection Sajjadanashin Sayed.v.Musa Dadabai Ummar(2000)3 SCC 350:(2000 AIR SCC 901: AIR 2000 SCC 1238) where this court on a detailed consideration of law in India and elsewhere held that even if, in an earlier suit for injunction, there is an incidental finding on title, the same will not be binding in a latter suit or proceeding where title is directly in question, unless it is established that it was 'necessary' in the earlier suit to decide the question of title for granting or refusing injunction and that the relief for

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injunction was found or based on the finding on title. Even the mere framing of an issue on title may not be sufficient as pointed out in that case."

11. The learned counsel appearing for the respondent relying on a decision reported in Sajjadaanashin Syed Md B.E. Edr(D) by L.Rs., -vs-Musa Dadabhai Ummer and others(AIR 2000 Supreme Court 1238) wherein the relevant observation of the Court is as follows:

"The test to determine whether an issue was directly and substantially in issue is earlier proceedings or collaterally or incidentally, is that if the issue was 'necessary' to be decided for adjudicating on the principal issue and was decided, it would have to be treated as 'directly and substantially' in issue and if it is clear that the judgment was in fact based upon that decision, then it would be res judicata in a latter case. One has to examine the plaint, the written statement, the issues and the judgment to find out if the matter was directly and substantially in issue. It is not to be assumed that matters in respect of which issues have been framed are all of them directly and substantially in issue."

12. The other decision relied on by the learned counsel appearing for the respondent is Shri Inacio martins, deceased through Lrs.-vs-Narayan Hari Naik and others(AIR 1993 Supreme Court 1756) wherein the suit filed by the plaintiff for declaration that he was lessee and for injunction restraining defendants from interfering with his possession of suit property. Dismissal of that suit on technical ground that plaintiff was no more in possession of suit property and a suit for mere declaration cannot lie. Subsequent suit for declaration of plaintiff as tenant and for recovery of possession. Not barred by principles of res judicata since question of status of plaintiff as lessee was not decided in earlier suit.

The said facts in the above dictum will not be applicable to the present facts of the case. So this Court is of the view that the plaint filed by the plaintiff is barred under Section 11 of CPC and under Order 2 Rule 2(3) of CPC. The points are answered accordingly.

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13. In the result, the appeal is allowed setting aside the decree and judgment in A.S.No.14 of 1995 on the file of Court of Sub Judge, Poonamallee and consequently, the suit in O.S.No.703 of 1985 is dismissed with costs. Consequently, connected CMPs are also closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Sub Judge,
   Poonamallee.

2. The District Munsif ,
   Poonamallee.

3. The Section Officer,
VR Section, High Court,
Madras.

+ 1 cc to Mr. S. Sadasharam, Advocate, SR No.1834

+ 1 cc to Mr. S.Y. Rahuraman, Advocate, SR No.1868

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